HUNTON& WILLIAMS

Hunton & Williams LLP
1900 K Street, N.W.
Washington, D.C. 20006-1109

Tel 202 ● 955 ● 1500
Fax 202 ● 778 ● 2201

DOUGLAS J. HEFFNER
Direct Dial: 202-419-2014

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By Hand

Honorable David Spooner
Assistant Secretary for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, DC 20230

Attn: Weighted Average Dumping Margin

Dear Mr. Spooner:

On behalf of Dofasco Inc. ("Dofasco"), we hereby submit comments in response to the Department's March 6, 2006 notice proposing a change in the Department's standard practice of calculating weighted average dumping margins in an original antidumping duty investigation. Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin During an Antidumping Duty Investigation, 43 Fed. Reg. 11,189 (Dep't Comm. Mar. 6, 2006) ("March 6 Notice").

The March 6 Notice states that "the Department proposes that it will no longer make average-to-average comparisons without providing offsets for non-dumped comparisons" in order to conform with paragraph 7.32 of a decision of a World Trade Organization ("WTO") panel in U.S.-Zeroing. March 6 Notice, at 11,189 (citing Panel Report, United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("U.S.-Zeroing"),

WT/DS294/R, ¶ 7.32, circulated October 31, 2005). Dofasco agrees with the Department's decision to change its calculation methodology. For the reasons below, Dofasco recommends that the Department replace the current methodology simply by eliminating "zeroing".

For unstated reasons, the Department does not state in the March 6 Notice what it proposes to implement to replace current practice, but expects the public to comment on its "proposal". Without a concrete proposal from the Department, Dofasco chooses not to speculate in these comments on the full range of possible changes that the Department might be contemplating. Instead, Dofasco reserves the right to comment on the merits of any other proposals when it submits its rebuttal comments. Moreover, when the Department proposes a specific replacement methodology, it should again provide an opportunity for public comments prior to publishing a new rule or other modification, as required by 19 U.S.C. § 3533(g)(1)(C). As explained in detail under point one below, the Department is not just changing its practice for one specific case, but instead is changing its practice generally under a statutory provision that requires notice and opportunity for public comment to the Department before announcement of final agency action. As a result, the Department should be more specific about its intentions concerning this proposal, not less.

I. THE DEPARTMENT ADMITS THAT IT MUST CHANGE ITS POLICY GENERALLY TO COMPLY WITH THE PANEL REPORT IN U.S.-ZEROING; THE DEPARTMENT SHOULD DO SO BY FIRST ISSUING A SPECIFIC PROPOSED RULE, THEN LATER A FINAL RULE.

When a WTO panel finds that the Department's action in an antidumping proceeding is inconsistent with the WTO Agreement, the Uruguay Round Agreements Act ("URAA") provides two distinct paths by which the Department may conform with the WTO panel's findings, depending on the nature and breadth of the Panel's findings: through broad policy change under section 123(g)(1) (19 U.S.C. § 3533(g)(1)), or through proceeding-specific change under section 129(b) (19 U.S.C. § 3538(b)).

Section 129(b) provides a mechanism for addressing a panel or WTO Appellate Body report "that contains findings that an action" by the Department is not in conformity with the AD Agreement (or the Agreement on Subsidies and Countervailing Measures ("SCM Agreement")). 19 U.S.C. § 3538(b)(1). The mechanism allows the Department to issue a recommended new determination with respect to that particular underlying antidumping proceeding that would conform its action with the AD (or SCM) Agreement, and then, following consultation between the U.S. Trade Representative ("USTR") and the Department and the appropriate Congressional committees, USTR may then authorize the Department to implement the recommended new determination with respect to the underlying antidumping proceeding. Id. § 3538(b)(2)-(4).

In contrast, section 123(g)(1) of the URAA establishes a separate procedure where a panel or Appellate Body report finds "that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements". 19 U.S.C. § 3533(g)(1). As explained in the Statement of Administrative Action ("SAA"), section 123(g) focuses on "administrative practice consisting of written policy guidance of general application". SAA, at 352 (reprinted in H.Doc. 103-316, v.1, at 1021) (emphasis added). The procedure includes additional steps, including the requirement that the Department publish a notice in the Federal Register of the proposed modification and the explanation for the modification, followed at a later date by publication of the final rule or modification. 19 U.S.C. § 3533(g)(1)(C) & (F).

In its March 6 Notice, the Department invoked section 123(g)(1) of the URAA. March 6 Notice, at 11,189. This is fully consistent with a position that the Panel Report in U.S.-Zeroing requires the Department to not only calculate new dumping margins for the specific original investigations that were the subject of the European Commission's WTO complaint,

but also requires the Department to change its practice with respect to all future original investigations.

In past cases where the Department has changed its regulations or procedure pursuant to section 123(g)(1), the Department has issued a formal, specific proposed rule, allowed time for public comment on that specific proposed rule, and then issued a final rule. See Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 70 Fed. Reg. 47,738, 47,738 (Dep't Comm. Aug. 15, 2005) (proposed rule) (citing section 123(g)(2) of the URAA); Procedures for Conducting Five-Year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders, 70 Fed. Reg. 62,061, 62,062 (Dep't Comm. Aug. 15, 2005) (final rule) (again citing section 123 of the URAA).

By invoking the mechanism under section 123 of the URAA, the Department would have to follow the same procedure: laying out a specific proposed rule of general application, followed by opportunity for comment and only then publishing a final rule. In this case, the Department would need to change 19 C.F.R. § 351.414(a), which stipulates that "[t]he Secretary normally will average prices used as the basis for normal value and, in an investigation, prices used as the basis for export price or constructed export price as well." In the March 6 Notice, the Department has invoked section 123(g) to signal that it intends to change the general rule, but the Department does not set forth a specific new proposed rule to take its place. That intermediate step would be necessary before the Department issues any final rule.

II. THE PANEL REPORT IN U.S.-ZEROING STATES FLATLY THAT ZEROING IN ORIGINAL ANTIDUMPING INVESTIGATIONS IS INCONSISTENT WITH THE WTO ANTIDUMPING AGREEMENT.

If the Department's objective is to conform its calculation methodology in all future original investigations to conform with the aspect of the Panel Report in U.S.-Zeroing that the

United States has decided not to appeal, specifically paragraph 7.32, the Department need look no further than the named paragraph for a solution:

> In light of the foregoing considerations, the Panel **finds** that the United States has acted in breach of Article 2.4.2 of the *AD Agreement* when in the anti-dumping investigations at issue USDOC did not include in the numerator used to calculate weighted-average dumping margins any amounts by which average export prices in individual averaging groups exceeded the average normal value for such groups.

U.S.-Zeroing, ¶ 7.32 (emphasis original). The paragraph both identifies the problem (zeroing) and suggests the solution (eliminate zeroing). It is just that simple. The Panel in U.S.-Zeroing found that the United States breached Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement") because it failed to include "in the numerator" of the weighted-average dumping margin equation "any amounts" by which average export prices for particular models (i.e., "individual averaging groups") exceeded the normal value for such models. The Panel Report does not state that the Department violates Article 2.4.2 of the AD Agreement because of the variables that it does introduce into the equation (i.e., average export prices or average normal values for particular models). Instead, paragraph 7.32 of the Panel Report in U.S.-Zeroing says the Department violates Article 2.4.2 by what it omits from the numerator: average prices for models where the dumping margin is zero or negative. Thus, to comply with the omission identified in paragraph 7.32, the Department must not omit from the numerator of the final weighted-average dumping calculation any model-specific average prices for non-dumped sales.

III. THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT HAS HELD THAT ZEROING IS NOT REQUIRED UNDER THE EXISTING U.S. STATUTE, THUS THERE IS NO LEGAL REASON WHY THE DEPARTMENT COULD NOT ELIMINATE ZEROING.

As explained above, the WTO Panel Report in U.S.-Zeroing found that the Department violates the AD Agreement by excluding average prices of non-dumped models from the

numerator of the Department's weighted-average margin equation, which leads to the obvious solution of including such average prices of non-dumped models as the means of complying with the AD Agreement. There is no legal reason preventing the Department from doing precisely that, because the Court of Appeals for the Federal Circuit ("CAFC") has held that the Tariff Act of 1930, as amended (the "Act"), neither forbids nor requires the Department to "zero" average prices for models with negative dumping margins in the numerator of the weighted-average dumping margin. In Timken Co. v. United States, the respondent argued that the Act forbade the practice of zeroing. In contrast, the petitioners and the Department argued that the Act required the Department to zero out average prices of models with negative dumping margins, citing 19 U.S.C. § 1677(35)(A), which defines the "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise" (emphasis added). The Department also cited various dictionary definitions of the word "exceed" in order to interpret 19 U.S.C. §1677(35)(A). Timken Co. v. United States, 354 F.3d 1334, 1341 (Fed. Cir.), cert. denied, 543 U.S. 976 (2004). The Court held as follows:

> Recognizing this as a close question, we are reluctant to find these dictionary definitions so clear as to compel a finding that Congress expressly intended to require zeroing. Even using the above "greater than" definitions, the statute does not plainly require consideration of only those dumping margins with a positive value. At least in a mathematical context, "exceeds" does not unambiguously preclude the calculation of a negative dumping margin. We thus disagree with the government's position that Congress deliberately used the word "exceeds" to avoid the calculation of negative dumping margins, instead of using the more open-ended phrase "difference between." … Accordingly, we conclude that Congress's [sic] use of the word "exceeds" does not unambiguously require that dumping margins be positive numbers.

Id. at 1341-42. The Timken decision applied only to administrative reviews, but the CAFC extended the reach of its decision in Timken to original investigations in Corus Staal BV v.

Department of Commerce. See Corus Staal B.V. v. Department of Commerce, 395 F.3d 1343, 1347 (Fed. Cir. 2005) (rejecting attempts to distinguish Timken on grounds that Timken covered administrative reviews, not original investigations), cert. denied, 126 S.Ct. 1023 (2006).

Thus, not only does the WTO Panel decision in U.S.-Zeroing compel the Department to eliminate zeroing for the United States to comply with the AD Agreement, but U.S. law gives the Department the discretion to interpret the law to do exactly that, through a reasoned change in the Department's past interpretation of 19 U.S.C. § 1677(35) .

IV. THE DEPARTMENT SHOULD CONTINUE TO USE AN AVERAGE-TO-AVERAGE CALCULATION METHODOLOGY.

Dofasco is concerned that the Department is considering the elimination of the average-to-average calculation methodology as a way supposedly to avoid the WTO Panel's decision in U.S.-Zeroing. The Department should reject such a possibility, for a variety of reasons.

A. The Authoritative Interpretation of the URAA, as Embodied in the SAA, States That the Average-to-Average Method Is the Approach the Department Should Follow in "Normal" Investigations.

The SAA, which is the authoritative interpretation of the URAA, expressly discusses the calculation methodology the Department should follow in original investigations. The SAA states as follows:

> Consistent with the [AD] Agreement, new section 777A(d)(1)(A)(i) provides that in an investigation, Commerce normally will establish and measure dumping margins on the basis of a comparison of a weighted-average of normal values with a weighted-average of export prices or constructed export prices.

SAA, at 172, reprinted in H.Doc. 103-316, v.1, at 842 (emphasis added). The Administration in the SAA deliberately used the stronger word "will" instead of "may" for a reason, to underscore that the Department may have discretion to deviate from the average-to-average

methodology in unusual investigations, but not in a normal investigation. As noted above, in its March 6 Notice, the Department has made clear that it is changing its practice generally, not just for the specific investigations that were the subject of the European Commission's WTO complaint. Any change that the Department makes to its practice generally, therefore, must take into account the requirement that Congress expects the Department normally to calculate dumping margins in an original investigation on the basis of an average-to-average methodology.

B. The Average-to-Average Methodology Makes Sense in Most Cases, Particularly Those Cases Involving Large Numbers of Transactions.

There are sound reasons why Congress required that the Department use the average-to-average method in most cases, as opposed to other methods that may be permissible under the WTO AD Agreement. First, the average-to-average method simplifies the calculation of the weighted-average dumping margin. There is no worry about establishing an elaborate scheme for determining which particular home market transactions to compare for purposes of establishing normal value, because all home market transactions are supposed to be used, and averaged, model-by-model.

Second, comparison of average prices for a given model yields more predictable results, and the results are less sensitive to aberrational sales. This is no small matter, because after all, the Department should administer the antidumping law in a way that makes it possible for foreign manufacturers to have some idea of the normal value to compare to any given U.S. sale, so that the foreign manufacturer can make sure that it is complying with U.S. law. The more complicated the scheme for ascertaining normal value, the less transparent the process becomes from the standpoint of the foreign manufacturer, as a practical matter, and thus the more "unfair" the U.S. unfair trade laws become for foreign manufacturers trying to compete fairly in the U.S. market.

Finally, use of averages are most appropriate in cases where there are a large number of sales in both the home market and U.S. market, with normal market price fluctuations over the period of investigation that result from market forces. The Department has commented in its own Antidumping Manual ("AD Manual") that it "normally compare[s] the weighted-average EP or CEP to the weighted-average NV for a comparable product sold during the POI." AD Manual, ch. 6, at 7. The Department states that alternative calculation methodologies are possible, but only in special cases, such as "for large capital goods made to order, such as transformers". Id. The AD Manual adds that another reason for deviation from period-wide average-to-average comparisons is in cases involving hyper-inflationary economies or situations where there was a "consistent downward trend" in both U.S. and comparison country markets during the period of investigation. Id. at 7-8.

But these are just the narrow and rare exceptions that illustrate the wisdom of the general rule in favor of the average-to-average method. It would be unlawful (based on the SAA's stipulation of the methodology that the Department will normally use) for the Department to abandon the average-to-average method for most original investigations. Moreover, the Department should encourage and enable foreign manufacturers to comply with the US dumping law by having a transparent the process from the standpoint of the foreign manufacturer.

V. ELIMINATION OF ZEROING WOULD BE EASY FOR THE DEPARTMENT TO IMPLEMENT, REQUIRING SIMPLY THE ELIMINATION OF ONE LINE IN THE DEPARTMENT'S MARGIN CALCULATION PROGRAM.

The Department can easily implement elimination of zeroing by making one simple change in its standard margin calculation program. The Department currently "zeroes" out models with negative dumping margins from the final calculation of a weighted-average margin through the following line of programming:

IF EMARGIN LT 0 THEN EMARGIN=0;

To implement the obvious and natural solution for the Department's stated desire to comply with the findings and recommendations of the WTO Panel in U.S.-Zeroing, the Department need not invent a complex new replacement scheme, it need only eliminate one line of programming from its standard dumping margin calculation program.

VI. CONCLUSION

For all of the above reasons, the Department has at hand an obvious, legal, easy-to-implement, permanent solution to conform U.S. law with the WTO AD Agreement. The Department should respond to the WTO's recommendation to eliminate zeroing, by eliminating zeroing, and not attempt to circumvent the WTO decision by abandoning the average-to-average calculation methodology.

Respectfully submitted,

William Silverman
Douglas J. Heffner
Richard P. Ferrin
Counsel to Dofasco Inc.

Enclosure: 1 CD-ROM